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No. 88-1321

In the Supreme Court of the United States

OCTOBER TERM, 1988

NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION, PETITIONER

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals, in upholding the decision of the Environmental Protection Agency (EPA) finding petitioner liable for noncompliance penalties under Section 120 of the Clean Air Act, 42 U.S.C. 7420, properly gave deference to EPA's interpretation of the federally enforceable Ohio state implementation plan.

2. Whether the court of appeals properly upheld the exclusion of evidence of technological and economic infeasibility at the liability stage of the Section 120 noncompliance proceeding.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 858 F.2d 282. The initial decision of the administrative law judge (Pet. App. E1-E19) and the final order of the Environmental Protection Agency chief judicial officer (Pet. App. D1-D7) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1) was entered on September 23, 1988. A petition for rehearing was denied on November 10, 1988 (Pet. App. C1). The petition for a writ of certiorari was filed on February 8, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act, 42 U.S.C. 7401 *et seq.*, establishes a joint federal and state program to control and improve the nation's air quality. Section 109, 42 U.S.C. 7409, requires the Environmental Protection Agency (EPA) to promulgate national ambient air quality standards, and Section 110(a)(1), 42 U.S.C. 7410(a)(1), requires each State to adopt and submit for EPA approval a state implementation plan (SIP) to implement, maintain, and enforce the federal air quality standards within its borders. The SIP is to contain detailed regulations limiting emissions from air pollution sources, including timetables for compliance, and must be approved by EPA. 42 U.S.C. 7410(a)(1), (a)(2). Like original SIPs, revisions of SIPs must be submitted to and approved by EPA. 42 U.S.C. 7410(a)(3). Once an initial SIP or a SIP revision is approved, it is promulgated as a federal rule, and the emissions limitations are enforceable as federal law. 42 U.S.C. 7410(d).

The Clean Air Act provides several enforcement mechanisms, including Sections 113 and 120, 42 U.S.C. 7413 and 7420. Section 113 authorizes EPA to initiate judicial proceedings to sanction noncompliance with applicable SIP requirements by seeking injunctive relief and civil penalties. Section 120, on the other hand, authorizes EPA in an administrative proceeding to recoup from the owner or operator of a major stationary source the economic value of its delaying compliance with applicable SIP requirements.

The Section 120 penalty is calculated on the basis of the cost that a source avoids by delaying compliance. The penalty begins accruing as of the issuance of a notice of noncompliance. 42 U.S.C. 7420(d)(2). A noncomplying source that receives a notice of noncompliance must either

(1) submit a petition for reconsideration, in which it can contest the finding of liability, or (2) calculate the amount of the penalty owed and the appropriate payment schedule. 42 U.S.C. 7420(b)(4); 40 C.F.R. 66.13(a). If the noncomplying source files a petition for reconsideration on the issue of liability, the EPA Administrator may, among other things, provide an adjudicatory hearing to determine whether the source is in violation of applicable SIP requirements. 42 U.S.C. 7420(b)(5); 40 C.F.R. 66.41. Once there is a decision that a source is liable for its noncompliance, a second penalty phase commences for calculation of the amount of the penalty owed. 40 C.F.R. Pt. 66, Subpt. F.

2. In February 1979, EPA promulgated a combined primary and secondary national ambient air quality standard for ozone. See 44 Fed. Reg. 8202; 40 C.F.R. 50.9.[1] To attain the national standard for ozone, the State of Ohio revised its SIP in 1981 to include regulations restricting the emission of air pollutants that contribute to ozone formation. See Ohio Admin. Code § 3745-21-09 (1987). EPA approved the SIP. Among its provisions, the Ohio SIP limits the emission of volatile organic compounds (VOCs) during the application of extreme performance (paint) coatings to miscellaneous metal parts and products, including automobiles and trucks, in excess of 3.5 pounds of VOCs per gallon of coating, excluding water.[2] The Ohio

[1] Ozone, a byproduct of the photochemical oxidation of volatile organic compounds (such as paint coatings), is a respiratory irritant that is linked to various health disorders. 44 Fed. Reg. 8203-8204 (1979). See generally *American Petroleum Institute* v. *Costle*, 665 F.2d 1176 (D.C. Cir. 1981) (upholding EPA's ozone standard), cert. denied, 455 U.S. 1034 (1982).

[2] The Ohio Administrative Code states in pertinent part:

> [N]o owner or operator of a miscellaneous metal part or product coating line may cause, allow or permit the discharge into the

SIP exempts from regulation "the application of a refinishing coating to motor vehicles and trailers." Ohio Admin. Code § 3745-21-09(U)(2)(c) (1987). Section 110 of the Clean Act required sources to comply with the SIP emission limitations by December 31, 1982. 42 U.S.C. 7410.

3. Petitioner owns and operates an assembly plant near Springfield, Ohio, at which it applies paint and other extreme performance coatings to newly manufactured and assembled trucks. In September 1984, EPA notified petitioner that emissions from ten of the coating lines at its Springfield facility violated the VOC emission limits in the Ohio SIP. Petitioner sought and was granted an administrative hearing on the issue of its liability for noncompliance penalties under Section 120 of the Clean Air Act. In response to a motion in limine by EPA, the administrative law judge (ALJ) ruled that claims of technological and economic infeasibility are irrelevant to the question of petitioner's liability for violation of the Ohio SIP and therefore that evidence bearing only on that issue was not admissible as evidence at the liability hearing. Pet. App. F1-F8. The ALJ determined, however, that infeasibility evidence could be retained in the record as an offer of proof for the penalty calculation of the proceeding. *Id.* at F7.

At the hearing petitioner contested its liability for noncompliance penalties on the grounds that (1) two of its painting lines were not "coating lines" within the definition of the Ohio SIP; (2) four of its painting lines, on which "touch-up" operations on newly assembled trucks are per-

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ambient air of any volatile organic compounds from such coating line * * * [in excess of 3.5 pounds of volatile organic compounds (minus water) per gallon as applied].

Ohio Admin. Code § 3745-21-09(U)(1)(a)(iii) (1987).

formed, are entitled to a refinishing exemption under the Ohio SIP; and (3) four of its painting lines, on which both metallic and nonmetallic parts are painted, are not regulated by the Ohio SIP. After a hearing on the record, the ALJ concluded that each of petitioner's Springfield coating lines is regulated by the Ohio SIP limiting VOC emissions, that petitioner's painting operations were in violation of the SIP emission limitations, and that petitioner was liable for Section 120 noncompliance penalties. Pet. App. E1-E19. Petitioner appealed the ALJ's decision to the EPA Administrator. EPA's chief judicial officer, on behalf of the Administrator, affirmed the ALJ's decision. *Id.* at D1-D7.

4. Petitioner then sought review in the court of appeals. The court affirmed EPA's decision and its interpretation of the federally enforceable Ohio SIP. Pet. App. A1-A14. In upholding EPA's interpretation of the Ohio SIP, the court concluded that EPA's interpretation of the Ohio SIP is entitled to "considerable deference." *Id.* at A7.[3] The court also concluded that the interpretation is consistent with the terms of the regulations. *Id.* at A7-A12. In addition, the court considered petitioner's claim that it would be deprived of due process if it were not permitted to introduce evidence of technological and economic infeasibility as a defense to liability. The court held that petitioner's due process concerns "are satisfied by allowing infeasibility arguments at the penalty stage" (*id.* at A13) and therefore upheld the ALJ's decision to exclude evidence of technological and economic infeasibility at the liability hearing.

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[3] The court relied in part on the fact that testimony from the principal draftsman of the Ohio SIP supported EPA's interpretation of the SIP provision. Pet. App. A10.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Review by this Court therefore is not warranted.

1. Petitioner first argues that, although the Ohio SIP is approved and enforced by EPA, it was improper for the court to give any deference to EPA's interpretation of the SIP since EPA did not write the regulations. Pet. 6-8. Petitioner's simplistic argument reflects a lack of understanding of the relationship between the States and EPA under the Clean Air Act.

The States submit their SIPs to EPA to meet their obligation under the Clean Air Act to control air pollution within their borders. A SIP thus represents the judgment of a State regarding how to meet its obligations under the Clean Air Act, what pollutant emission reductions are appropriate, and from what sources those reductions should come. EPA, however, "is the ultimate supervisor" for the administration and implementation of the Act. *Duquesne Light Co.* v. *EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983). A SIP has no effect as a matter of federal law unless it is approved and promulgated by EPA. Once EPA approves a SIP, its provisions are enforceable as federal law and can be enforced through a variety of mechanisms, including Section 120. See 42 U.S.C. 7410(d); 42 U.S.C. 7420(a)(2)(A)(i). Thus, Congress placed the ultimate responsibility for enforcement of the Clean Air Act on EPA. Since the Ohio SIP was approved by EPA in compliance with the Clean Air Act and is enforceable by EPA, the agency is fully entitled to interpret its provisions consistent with the overall goals of the Act. Accordingly, although EPA did not itself write the Ohio SIP, EPA was required to and did review and approve it before it became

effective, and all of the other reasons underlying the usual "deference to administrative views * * * bottomed on respect for agency expertise" fully support deference to EPA's interpretation in this case. *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 n.9 (1980); see also *Gardebring* v. *Jenkins*, 108 S. Ct. 1306, 1314 (1988); *United States* v. *Larionoff*, 431 U.S. 864, 872-873 (1977) (deferring to Navy's construction of Department of Defense regulation); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945).

Petitioner next argues, much more broadly, that this Court's decisions permit a court to defer to an agency's intepretation of a statute or regulation "*only* in situations where 'the agency is required to apply [legal] standards to a particular set of facts' " and not when any broader question of law is raised. Pet. 8-9 (emphasis added) (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987)). That contention, apart from being of no aid to petitioner since this case involves the application of legal standards to a particular set of facts, is demonstrably wrong.

Unlike the *Cardoza-Fonseca* case on which petitioner relies almost exclusively, this case involves interpretation of regulations, not statutes. It is in that context that this Court has applied the most generous measure of deference, holding—in cases that certainly involved pure questions of law—that, "[i]n construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *United States* v. *Larionoff*, 431 U.S. at 872 (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); see also *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 108 S. Ct. 427, 440 (1987); *Gardebring* v. *Jenkins*, 108 S. Ct. at 1314.

Even in the construction of statutes, it is—contrary to petitioner's contention—this Court's longstanding and frequent practice to defer to agency constructions, even when a pure question of law is involved. See, *e.g.*, *K mart Corp.* v. *Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988); *EEOC* v. *Commercial Office Products Co.*, 108 S. Ct. 1666, 1671 (1988); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 108 S. Ct. 1392, 1397 (1988); *Honig* v. *Doe*, 108 S. Ct. 592, 605 n.8 (1988); *NLRB* v. *United Food & Commercial Workers Union*, 108 S. Ct. 413, 421 (1987); *Bowen* v. *Yuckert*, 482 U.S. 137, ____ n.8 (1987) (slip op. 18 n.8); *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, __ (1987) (slip op. 14); *Lukhard* v. *Reed*, 481 U.S. 368, 378-379 (1987); *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 468 (1987); *Wright* v. *City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 427 (1987); *Clarke* v. *Securities Industry Association*, 479 U.S. 388, 403-404 (1987); *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984) (and cases cited therein). As the above citations indicate, that has been this Court's practice after the *Cardoza-Fonseca* decision as well as before.

Cardoza-Fonseca itself does not stand for a contrary rule. The opinion of the Court does, to be sure, contain statements that can be taken out of context to stand for the proposition that deference to agency interpretations of statutes is the exception and de novo construction of ambiguous statutes the rule. Four Justices have already observed, however, that that language should not be so applied, *United Food Workers*, 108 S. Ct. at 426 (Scalia, J., concurring), and this Court's subsequent cases appear to bear that observation out. In any event, *Cardoza-Fonseca* involved only "[t]he narrow legal question whether the two [differently worded] standards [set out in two statutory sections] are the same," 480 U.S. at 448,

and its language suggesting the inappropriateness of deference to the agency interpretation must be read in light of the narrowness of the question facing the Court. Moreover, in *Cardoza-Fonseca* the Court regarded the agency interpretation at issue as contrary to clear congressional intent and believed that the agency had given the statute inconsistent interpretations over time – factors that would justify a rejection of the agency interpretation whether the Court applied deference or not. Here, by contrast, EPA was not called on to determine whether two differently worded provisions mean the same thing, but rather whether petitioner's coating plants were or were not covered by the terms of the Ohio SIP. The court of appeals determined that EPA's conclusion that petitioner's coating lines are regulated, whether or not they have ovens, was consistent with the goals of the Clean Air Act (Pet. App. A9);[4] that the refinishing exemption had been consistently interpreted by EPA over time (*id.* at A11); and that EPA's interpretation of the SIP with respect to coverage of miscellaneous metal parts or product coating lines "is consistent with the plain language of the SIP" (*ibid.*).

Petitioner's further contention that EPA's interpretation of the Ohio SIP is not even reasonable (Pet. 10-11) is also wrong. As the court of appeals held, EPA's interpretation of the Ohio SIP "is in keeping with the goal of the Clean Air Act to reduce emission of organic compounds from operations such as those employed by Navistar" (Pet. App. A11-A12). Petitioner has never disputed that each of the coating lines at issue emits VOCs in excess of the Ohio SIP limitations. One of the funda-

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[4] In fact, the State of Ohio subsequently revised its SIP to make it clearer that coating lines emitting VOCs, whether or not they have ovens, are regulated under the SIP. Pet. App. A10 n.1.

mental purposes of the Clean Air Act and the federally approved Ohio SIP is to provide for the attainment and maintenance of the National Ambient Air Quality Standards and to require emission reductions of organic compounds from major sources in areas that have not attained those standards.[5] Indeed, in rejecting petitioner's argument that its coating lines without ovens were not regulated, the court noted that "[t]he two painting lines at issue emitted 315 tons of compounds in 1985, nearly 200 tons above the allowable level. It would be an anomalous result to interpret the regulations so as to exclude coating lines without ovens when they contribute so greatly to the undesired pollutants in the air that are to be reduced by the regulations." Pet. App. A10. Since EPA's construction of the Ohio SIP is reasonable and is consistent with the intent of the SIP and the goals of the Clean Air Act, the court of appeals properly determined not to substitute its judgment for that of the agency.

2. Petitioner contends that evidence of economic and technological infeasibility of compliance was improperly excluded from the liability hearing and that the decision of the court of appeals upholding the exclusion creates a conflict among the circuits. Pet. 12-15. That claim is fundamentally inconsistent with the Clean Air Act, its legislative history, and judicial precedent. The court of appeals correctly concluded that, "[g]iven Congress' intent to obtain compliance or require that facilities be shut down, regardless of feasibility, and given that due process con-

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[5] Petitioner's facility is located in such a nonattainment area. The Ohio SIP was adopted pursuant to Part D of the Clean Air Act, Sections 171-178, 42 U.S.C. 7501-7508. Congress enacted Part D in 1977 for the purpose of imposing particularly stringent air pollution requirements on areas of the country that did not meet the national standards by 1979. 47 Fed. Reg. 28,097, 28,098 (1982).

cerns are satisfied by allowing infeasibility arguments at the penalty stage," it should "affirm the ALJ's decision to exclude evidence of technological and economic infeasibility at the liability hearing." Pet. App. A13. The court rightly observed: "As the evidence was retained in the record for purposes of the penalty hearing, any due process requirements were met." *Ibid.*

The Clean Air Act is a "technology-forcing" statute, requiring States to formulate pollution control strategies that "force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible." *Union Electric Co.* v. *EPA*, 427 U.S. 246, 257 (1976). Thus, a source must meet SIP standards or face penalties for continuing operations "regardless of whether available technology enables [it] to meet the standards." *Duquesne Light Co.* v. *EPA*, 698 F.2d at 463.

Nonetheless, noncomplying sources have several opportunities to raise claims of infeasibility. They may present their claims before the state agency formulating the SIP or SIP revision, in a request for a variance or an exemption from a SIP or a SIP revision, or before state courts. Such claims also may be relevant to fashioning a compliance order under Section 113. *Union Electric Co.* v. *EPA*, 427 U.S. at 268. Since petitioner has the opportunity to raise its infeasibility claims at the penalty calculation stage of the Section 120 proceeding (Pet. App. A13), no due process considerations are implicated.

Moreover, contrary to petitioner's claim (Pet. 12), the exclusion of infeasibility evidence at the liability stage creates no conflict among the circuits. In neither of the two cases that petitioner cites did the court hold that claims of infeasibility may create a defense to Section 120 liability. One case, *Indiana & Michigan Electric Co.* v. *EPA*, 509 F.2d 839 (7th Cir. 1975), involved a challenge to

EPA's approval of two state implementation plans. The court approved EPA's refusal to consider the technological feasibility and economic impact of the two plans, but it stated that infeasibility "may be of significance" in Section 113 enforcement proceedings. *Id.* at 844. While noting that it was not deciding the extent to which such factors should be considered, the court stated that technological and economic considerations may be worthy of consideration "in terms of compliance schedules as well as the imposition of penalties." *Id.* at 845. Thus, the court was addressing the role of infeasibility only in the context of remedy, not liability.

In *Bethlehem Steel Corp.* v. *EPA*, 638 F.2d 994 (7th Cir. 1980), the court of appeals considered a request to review EPA's disapproval of a delayed compliance order under Section 113. Without further discussion, the court merely stated that a source "may raise its infeasibility defense in the course of enforcement proceedings." 638 F.2d at 1005. The court did not, however, hold that such claims constitute a defense to liability; rather it merely stated that such claims may be considered at some time during the proceeding.

Permitting infeasibility claims to be raised as a defense to Section 120 liability would substantially interfere with the congressional purpose of prompt attainment of national air quality standards and the compliance-forcing purpose of Section 120. No court of appeals has ever held that such claims can be raised at the liability stage of an enforcement proceeding. Petitioner's contention therefore does not merit review.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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